United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

75-1274

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P/S

To be argued by
DAVID S. GOULD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1274

UNITED STATES OF AMERICA,

Appellee,

—against—

EDUARDO MONTIELL,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

DAVID S. GOULD,
Assistant United States Attorney,
Of Counsel.

2

TABLE OF CONTENTS

TABLE OF CASES

PAGE

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Preliminary Statement

Appellant appeals from a judgment of conviction in the United States District Court for the Eastern District of New York (Bartels, J.) entered July 11, 1975, after a jury trial which convicted appellant on a two count indictment, to wit: possessing with intent to sell about fourteen ounces of cocaine, on September 20, 1974, and conspiring with "John Doe Alvaro" to distribute about fourteen ounces of cocaine, on and between September 19th and 20th, in violation of 21 U.S.C. § 841(a)(1). Appellant was sentenced to concurrent terms of imprisonment of five years on each count, plus a special parole term of five years. Execution of the sentence was stayed pending appeal and appellant is presently at large on bail.

On this appeal, appellant argues: (1) that the admission into evidence of a piece of tin foil containing traces

of cocaine, and scraping of cocaine taken from a commode was erroneous because the post arrest search which yielded these objects was illegal; (2) that the court committed plain error by not adequately defining "possession with intent to distribute" in its charge; and (3) that the court committed plain error by charging the jury that appellant was charged in Count II with "conspiracy to possess with intent to distribute" when, in fact, the indictment charged "conspiracy to distribute".

Statement of the Case

A. The Negotiations

The main witness for the Government was Angelo Carrion, a Suffolk County Police Detective assigned to work with the Long Island Drug Task Force (hereinafter "Task Force"). Agent Carrion had extensive formal and informal training concerning drugs and the drug subculture. He had made over fifty purchases of cocaine while acting as an undercover agent (104-108).[1] Agent Carrion was acting in an undercover capacity when he was involved in the negotiations for the cocaine sale upon which the indictment was predicated.

Agent Carrion first met appellant Eduardo Montiell through an informant at appellant's apartment at 11:30 p.m. on September 19, 1974. The informant, "Flip", had arranged for Carrion to purchase two kilos of cocaine from appellant for $60,000 and Agent Carrion, in fact, had the $60,000 with him when he arrived that night at appellant's apartment (200-205).

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[1] Page numbers in parentheses refer to pages of the trial transcript.

Upon arriving at appellant's apartment on September 19th, the informant knocked on the door and appellant let the informant and Carrion enter the apartment. The informant introduced Carrion to appellant as "John". Carrion immediately asked appellant for the "package". Appellant replied that the man with the package had been there earlier but had fled with package because he feared that someone was following him. Nevertheless, appellant told Carrion that he could arrange a deal for the next day involving two kilos of cocaine. Carrion gave appellant the unlisted phone number of the Task Force and told him to call around noon the next day. In total, Agent Carrion and Montiell spoke for about twenty minutes in a mixture of Spanish and English before Carrion and the informant left the premises (205-208).

Appellant called Carrion the next day, September 20th, at the unlisted Task Force number shortly after the time designated by Carrion. Montiell asked for "John" and identified himself as "Eddie".[2] The subsequent conversation —the substance of which was in Spanish—was recorded by Agent Carrion. Although appellant had arranged to sell Carrion two kilos of cocaine on the previous day, in the taped conversation he could only offer to sell Carrion one pound of cocaine for about $14,000. Appellant told Carrion that he did not have the cocaine at the time, but that another person did. However, he promised Carrion he would have the cocaine by four o'clock that afternoon. Appellant told Carrion to come right to his apartment and not to worry because everything was "cool" in the apartment (208-210, 216-217).

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[2] Agent Carrion had not given his name as "John" to any other contact that month. In addition, Carrion recognized the voice as that of appellant (288).

Later that afternoon, Agent Carrion arrived at appellant's apartment. Accompanying Carrion in the car was Phillip Hayward, a Task Force agent.[3] A back-up surveillance also arrived in separate cars. Agent Hayward remained in the car and Agent Carrion entered appellant's apartment alone (216-219). This time Montiell was not alone. With him was a Latin male whom Montiell introduced to Carrion as "Alvaro". Agent Carrion had never seen him before, and he had not expected him to be there.

Just after being introduced to "Alvaro", Carrion asked Montiell where the package was. Montiell pointed towards the kitchen table.[4] The three participants then walked over to the kitchen table where Carrion saw an empty ashtray, a white saucer containing a small quantity of white crystalline powder and a brown manila envelope. Inside the brown manila envelope Carrion found a large clear plastic bag containing more white crystalline powder. Carrion smelled the powder, and it smelled like cocaine. Carrion then asked Montiell to get a scale and some tin foil. After appellant brought Carrion the scale and tin foil roll from the kitchen cabinet, Carrion ripped off a little piece of tin foil and put a small quantity of the white powder from the bag on it. Appellant lit a match and, with Alvaro observing, burned the powder to determine how much the substance had been cut. Agent Carrion then rolled up the piece of tin foil he had used into a ball and dropped it into the ashtray on the table. Next, Carrion weighed the substance in the plastic bag and stated to Alvaro and Montiell that it was only fourteen ounces, two ounces short of the weight promised by appel-

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[3] Hayward also testified at the trial (see 292-343).

[4] Montiell's ground floor apartment consisted of two rooms and a bathroom. The front door opened on a hall which led to the bedroom. The combined kitchen and living room was to the immediate right of the front hallway.

lant on the phone earlier in the day. Alvaro interrupted and claimed it could not be short because he had brought over half a kilo. Appellant however, told Alvaro to check the weight for himself. When Alvaro did weigh it on the scale, he acknowledged that the weight was two ounces short. Carrion then attempted to bargain the price down to $12,500. Montiell and Alvaro refused to sell the cocaine for that price, so Carrion agreed to purchase it for $13,000. The bargain having been struck, Carrion informed appellant and Alvaro that he had to get the money from his friend in the car. Appellant agreed but told Carrion to leave the package of cocaine behind (219-226).

B. The Arrest[5]

After leaving the apartment, Agent Carrion returned to his car and told Agent Hayward that there were two men in the apartment with fourteen ounces of cocaine. Hayward relayed this information to the back-up team and then left the car with Carrion to return to Montiell's apartment (226, 300-302). By this time, however, it

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[5] The appellant's principal issue on appeal concerns the scope of the post arrest search of his apartment. Therefore, the facts surrounding the arrest are most relevant. Since the facts testified to at the trial were the same, except for some minor details, as testified to at the suppression hearing, references will be made to both interchangeably.

By way of preface, it should be noted that, although at the trial appellant objected to the admission into evidence of the taped conversation of September 19th, the roll of tin foil, the scale and the saucer, on appeal he takes objection only to the admission of the torn off piece of tin foil and the cocaine residue left around the toilet bowl when either Monteill or Alvaro flushed the cocaine down the toilet. Appellant also contested the admissibility of certain post-arrest statements made by appellant to Government agents. However, since these statements were not used at trial, their admissibility is not an issue on this appeal.

appears that Alvaro and Montiell suspected that Carrion was a Government agent, for when Carrion knocked on the door to be readmitted to the apartment, there was no response. He knocked again to no avail. When Hayward and Carrion heard a toilet flushing, Hayward yelled out "Federal Agents, open up" while Carrion tried unsuccessfully to kick down the steel frame door. Almost immediately Task Force Agents Robert Gunyan and George Manthe arrived at the door but even with their assistance the agents were unable to kick the door open. After about five minutes, appellant opened the door and was immediately placed under arrest by Gunyan and Manthe. Carrion and Hayward ran past down the hallway towards the bedroom to look for Alvaro (227-230, 303-304).

Agent Hayward ran through the bedroom, the kitchen and the bathroom looking in vain for Alvaro, who was never found. When Hayward ran into the bathroom, he noticed a smear of white powdery substance on the commode, above the water line. Manthe scraped up this substance with a matchbook. The substance was later chemically analyzed by a chemist from the Drug Enforcement Administration and determined to be cocaine (305-306, 184, 188). Meanwhile, Carrion was also searching the apartment looking for Alvaro. In the course of his pursuit of Alvaro, Carrion noticed that the piece of tin foil used to match test the cocaine was still in the ashtray where he had left it. Carrion recovered this tin foil which a DEA chemist later determined to contain traces of cocaine (180, 188, 230, 253).[6]

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[6] Shortly after the agents entered the apartment, Montiell's wife entered the apartment and began moving freely about the apartment while they were searching for Alvaro (231, 63).

ARGUMENT

POINT I

There was no violation of appellant's constitutional rights in the search and seizure of the powder and tin foil from his apartment.

Appellant asserts that the Task Force Agents should have been required to obtain a search warrant to look through his apartment after he had been placed under arrest (Appellant's Brief, p. 6). Since exigent circumstances existed at the time of the challenged search, a search warrant was not required. In addition, a search warrant was not required because the challenged evidence was in plain view when it was seized.

1. Since exigent circumstances existed, no search warrant was required

a. When Carrion had returned to the car after agreeing on a purchase price for the drugs, he told Hayward that there were two men inside the apartment (226). After announcing their identity and purpose, and receiving no response, the two agents endeavored unsuccessfully to arrest appellant by breaking down the door to the apartment. After appellant finally opened the door, two other agents, Manthe and Gunyan, placed appellant under arrest. Hayward and Carrion rushed past appellant looking for the other individual, Alvaro (86, 228-230, 304).

Appellant does not contest the legality of this initial entry into the apartment (Appellant's Brief, p. 7). He attacks, rather, the seizure of the rolled up tin foil and cocaine scrapings off of the commode subsequent to his arrest (Id.). At the suppression hearing, the United

States argued that the warrantless search of the apartment was justified by the fact that appellant's confederate, Alvaro, had not yet been apprehended and by the necessity to prevent any possible further destruction of evidence and to insure the safety of the law enforcement officers (140, see also 142-43). This position is plainly supported by the record.

Agent Carrion testified that as soon as he entered the apartment, he "started looking for the other individual," appellant's confederate, Alvaro (52). Agent Hayward testified:

> "I ran into the back bedroom. I ran into the bathroom. I went into the kitchen. I looked through the closets, under the bed. I was trying to find the other defendant" (61).[7]

Moreover, the agents also had to secure any potential weapons or evidence from appellant's wife. She had entered the apartment shortly after her husband's arrest and "was walking in the kitchen and around the apartment . . ." (63). Mrs. Montiell had been told her husband was under arrest (65). It would have been very easy for her merely to wipe the cocaine trace off the commode, hide some drugs on her person or obtain a weapon. Indeed, a shotgun was in fact found in a closet (65).

Finally, there was strong indication of an attempt to destroy evidence while the agents attempted to gain access to the apartment. They certainly had the constitutional right to secure any remaining evidence before it was too late. See *United States* v. *Pino*, 431 F.2d 1043, 1045 (2d Cir. 1970).

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[7] During Haywood's search, he saw the cocaine on the commode.

b. There is little doubt, under the holdings of this Court and the Supreme Court that, in these circumstances, the search that was conducted without a warrant was reasonable and proper.

In *United States* v. *Christophe*, 470 F.2d 865 (2d Cir.), *cert. denied*, 411 U.S. 964 (1972), this court stated that even after an arrest the agents

> "were entitled to conduct a cursory examination of the premises to see if anyone else was present who might threaten their safety or destroy evidence" (Id. at 869).

Moreover, this Court has stated that if there is a "reasonable prudent belief of danger", a warrantless search is justified. *United States* v. *Pino*, 431 F.2d 1043, 1045 (2d Cir. 1970). We are not here dealing with a petty postal offender; rather a substantial drug dealer. As Agent Manthe testified, it would be "suicidal" for the agents not to assume that such drug dealers were armed (127). There was then a reasonable belief that danger was at hand. *United States* v. *Albarado*, 495 F.2d 799, 801 (2d Cir. 1974); *United States* v. *Tramunti*, 513 F.2d 1087, 1104 (2d Cir. 1975).

Particularly apposite is *Warden* v. *Hayden*, 387 U.S. 294 (1966). There, the agents went to the bathroom after hearing running water and found incriminating evidence in a flush tank. Another agent found incriminating evidence in a washing machine when he went down to the basement searching for the bank robber and the money he stole (Id. at 298). The Supreme Court, expressly disclaiming reliance upon the "search incident to arrest" exception to the warrant (387 U.S. 298), held that the warrantless seizures was justified:

> "They acted reasonably when they entered the house and began to search for a man . . . and for

> weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require the police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others (Id. at 298-299).

In sum, given the fact that there was a missing suspect, an unrestrained third party (i.e. appellant's wife)[8] and a strong suspicion that some evidence had already been destroyed, it was certainly "reasonable" for the agents to have continued to search the apartment after appellant was arrested. Cf. *Cady* v. *Dombrowski*, 413 U.S. 433 (1973).[9]

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[8] In *United States* v. *Mapp*, 476 F.2d 67 (2d 1973), upon which appellant relies, the wife was clearly no threat because she, like her husband, had been arrested and restrained (Id. at 80). Here, the agents did not and could not forcibly restrain appellant's wife. Her roaming the apartment could not help but raise the reasonable concern that she might try to destroy evidence or seize a weapon (63). See also *Carlton* v. *Estelle*, 480 F.2d 759, 763 (5th Cir.), *cert. denied*, 414 U.S. 1043 (1973). Appellant's claim that his wife was no threat because she was an asthmatic (Appellant's Brief, p. 9) is beside the point. There is no evidence that the law enforcement officers were aware of this condition and there is no reason to believe that her condition prevented her from destroying evidence or attempting forcibly to secure the release of her husband.

[9] Appellant also asserts that there was enough evidence for the Task Force agents to secure a search warrant before Carrion arrived at the apartment to purchase the cocaine (Appellant's Brief, p. 9, fn.). But as this court recently stated in *United States* v. *Morell* and *Bruzon*, — F.2d — (2d Cir. Aug. 29, 1975), slip. op. 5873 at 5884, the agents were

> "entitled to wait until such time as events had proceeded to the point where the agents could be reasonably certain that the available evidence would ultimately support a conviction."

In addition, the agents would have an additional desire to wait until the cocaine was produced in order to be certain of keeping it from reaching "consumers".

2. The seized evidence was in plain view when the agents ran through the apartment looking for the missing suspect.

It is settled law that:

> "Objects falling within the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence". *Harris* v. *United States*, 390 U.S. 234, 236 (1968); see also *Ker* v. *California*, 374 U.S. 23 (1963); *United States* v. *Titus*, 445 F.2d 577, 579 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971).

Although *Coolidge* v. *New Hampshire*, 403 U.S. 443, 469 (1971) appears to have imposed the requirement that evidence in "plain view" may be seized without a warrant only when it was discovered inadvertently, it has since been held that

> "[t]he inadvertance requirement does not apply to cases when the prime motivation of an entry is to apprehend persons whom the police have probable cause to arrest." *United States* v. *Morell* and *Bruzon*, — F.2d — (2d Cir. Aug. 29, 1975, Slip. op. 5883).

In the case at bar, the "inadvertance" requirements would therefore not apply because "the prime motivation" for the entry was to effect the arrest of appellant and Alvaro. Here the agents were looking primarily for Alvaro when Agent Carrion saw and recovered the piece of tin foil "where he had [previously] left it" (53, 230, 253). Moreover, Agent Hayward too was looking for Alvaro when he discovered the film of cocaine left on the commode "on the edge, above the water" (64, 306)

> "I looked in the bathroom and I noticed some white powder on the edge of the commode in the bathroom" (306).

It is evident, then, that the contested items were seized when they "fell into the plain view of an officer who ha[d] a right to be in the position to have that view." *Harris* v. *United States, supra,* 390 U.S. at 236.[10]

POINT II

The Court's charge to the jury was in all respects adequate and contained only a de minimis discrepancy.

Appellant asserts that the court's charge on intent was insufficient on both counts in the indictment. Appellant further contends with respect to Count #2 that the court's error in charging "conspiracy to possess cocaine with intent to distribute" rather than "conspiracy to distribute cocaine" as charged in the indictment requires a reversal. As appellant concedes, since there was no objection to any portion of the charge, the error will not avail the appellant unless the failure to recognize the error would "work an obvious unfairness to the accused or perpetuate a miscarriage of justice." *United States* v.

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[10] Appellant states in his brief that if the tin foil ". . . was in open view it was not going to evaporate" (Appellant's Brief p. 9). Appellant's assertion as to the continued integrity of the unsecured evidence is questionable. Even an inadvertent flush of the toilet might have further eroded the cocaine traces on the commode. In any event, since the contested objects were in plain view, the agents did not have to secure a search warrant prior to seizing them whether or not they would have "evaporated" in the intervening time.

Schabert, 362 F.2d 369, 373-74 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966). *Anderson* v. *United States*, 417 U.S. 211 (1974).

1. The court's charge on intent was adequate

It is difficult to discern exactly what was the alleged infirmity in the court's charge on intent. After charging on the specifics of the statute involved, the court stated that "now you have heard me mention the word 'intentionally' and 'knowingly'" (395). The court then proceeded to give a thorough charge on criminal intent and knowledge (Id. at 395-397; see also Id. at 393).

Appellant apparently contends that the court erred in failing to define intent while discussing the elements necessary to prove each count of the indictment. However, it is uncontested that the court told the jury that intent was a necessary element of each count. The court's charge on the issue of intent was incontestably adequate. There was no confusion in the court's waiting to define intent until going through the other elements of the crime. If the appellant wanted more, he should have made a specific request. The charge as given was certainly not plain error.[11]

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[11] Even assuming arguendo that there was some informity in the intent charge, that infirmity—whatever it may be—should be viewed in light of the fact that the defense here was not lack of intent but that the defendant was the victim of a frameup. (See, e.g., 238, 239, 241, 242, 258, 334, 354, 357). *United States* v. *Valdes*, 417 F.2d 335, 339 (2d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970); *United States* v. *Spatuzza*, 331 F.2d 214, 217 (7th Cir.), *cert. denied*, 379 U.S. 829 (1964) (element of crime not charged); *United States* v. *Prujansky*, 415 F.2d 1045, 1048 (6th Cir. 1969). In *United States* v. *Bright*, 517 F.2d 584, 586, 588 (2d Cir. 1975), relied upon by the appellant, the charge erroneously defined "knowledge". The element of knowledge was the only issue seriously contested at trial and the jury sent in a note for clarification on that point.

2. The technical error in the charge on Count II did not amount to plain error.

Appellant correctly states that on Count II, the court erroneously told the jury that the charge was conspiracy to possess with intent to distribute rather than conspiracy to distribute as charged in the indictment. The appellant alleges:

> ". . . The former charge requires a jury to feel that a sale was imminently in the offing with greater certitude than in the latter charge" (Appellant's Brief, p. 14).

The uncontested evidence at the trial was that the sale was imminent. The drugs were present and the price was set. Only appellant's realization that Carrion was a Government agent prevented the final consummation of the sale.

It is difficult to discern the manner in which the error adversely prejudiced the defendant. Since the conspiracy to distribute could be proved with the same minimal evidence as a conspiracy to possess with intent to distribute there is, in fact, no meaningful difference between the charge in the indictment and the charge given by the court.

It should also be borne in mind that the jury found defendant guilty on Count I, possession with intent to distribute. The only additional factor it had to find in Court II, in essence, was that appellant conspired with Alvaro in the transaction, a portion of the charge not contested by appellant.

This is not a case where the jury was "operating almost completely in the dark" because the charge on the elements of the crime was incomplete and woefully

truncated. *United States* v. *Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974). The court in the case at bar adequately charged as to the elements of the crime and read the indictment and the statute to the jury. (See generally 385-395).

Nor is there any allegation that the court affirmatively misled the jury by the misstating the law. See *United States* v. *Demarco*, 488 F.2d 828, 832 (2d Cir. 1973); *United States* v. *Fields and Hamilton*, 466 F.2d 119 (2d Cir. 1972). In essence, all that appellant asserts is that "the charge to the jury varied from the indictment" (Appellant's Brief, p. 13). The variance, however, was not material and it is beyond cavil that a court will not reverse for "an obviously technical defect in a charge" to which no objection was taken. *United States* v. *Prujansky*, *supra*, 415 F.2d at 1048 (6th Cir. 1969). See, also, *United States* v. *Fields and Hamilton*, *supra*, 466 F.2d at 121.

CONCLUSION

The judgement of conviction should be affirmed.

Dated: October 16, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

DAVID S. GOULD,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of October 1975 he served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Murray Cutler, Esq.
16 Court Street
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

20th day of October 19 75

Irene B. Cohen (Bevilacqua)

IRENE B. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Commission Expires March 30, 1977